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No. 86-108

In the Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON, SUPERINTENDENT,
NEW JERSEY STATE PRISON, ET AL., PETITIONERS

v.

DANA BRAUNSKILL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Fed. R. App. P. 23(c) permits a federal court, when deciding whether to order the immediate release of a state prisoner who has been awarded habeas corpus relief, to consider the state's likelihood of success on appeal and the prisoner's danger to the community.

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INTEREST OF THE UNITED STATES

The question in this case is whether Fed. R. App. P. 23(c) allows a federal court, when deciding whether to order the immediate release of a state prisoner who has been granted habeas corpus relief, to consider the state's likelihood of success on appeal and the prisoner's danger to the community, in addition to the risk that the prisoner may flee the jurisdiction. The Court's resolution of that question will affect federal law enforcement in several ways. First, Fed. R. App. 23(c) has been applied by the federal

courts to determine whether to release a federal prisoner who has been granted relief on a collateral challenge to his conviction or sentence under 28 U.S.C. 2255. See *Ostrer* v. *United States*, 584 F.2d 594, 597 (2d Cir. 1978); *United States* v. *Dansker*, 561 F.2d 485, 486-487 (3d Cir. 1977) (en banc). Second, Fed. R. App. P. 23 will apply in a variety of actions brought against federal prison officials under the general habeas corpus statute, 28 U.S.C. 2241: namely, cases in which a federal parolee or probationer challenges the revocation of his release; cases in which a federal prisoner challenges the calculation of his parole release date; and cases in which a military prisoner challenges his conviction by a court-martial. See, *e.g.*, *Guerra* v. *Meese*, 786 F.2d 414 (D.C. Cir. 1986); *Calley* v. *Callaway*, 496 F.2d 701 (5th Cir. 1974); *Baker* v. *Sard*, 420 F.2d 1342 (D.C. Cir. 1969).

STATEMENT

1. Shortly after midnight on June 11, 1980, Jane Lyons entered the lobby of her apartment building in Bloomfield, New Jersey, and walked to the mailbox in the rear of the lobby. At that point, respondent put his arm around Lyons' neck, threw her to the floor, exposed himself, and placed a knife against her throat. Petitioner then sexually assaulted Lyons. *State* v. *Braunskill*, No. A-3645-80T4 (N.J. Super. Ct. App. Div. Dec. 14, 1982), slip op. 2-3.

Respondent was subsequently convicted in New Jersey Superior Court of sexual assault and unlawful possession of a weapon, in violation of N.J. Stat. Ann. §§ 2C:14-2, 2C:39-5d (West 1982 & Supp. 1986). He was sentenced to a total of eight years' imprisonment. The Superior Court Appellate Division affirmed his

conviction and sentence (*State* v. *Braunskill, supra*),[1] and the New Jersey Supreme Court denied review.

2. Respondent thereafter filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey. The district court granted respondent's habeas corpus petition and ordered that he be retried within 30 days or released (Pet. App. 1a). Petitioners moved the district court to stay its order pending appeal, and the district court denied the motion (*id.* at 12a-13a). Relying on *Carter* v. *Rafferty*, 781 F.2d 993 (3d Cir. 1986), the district court held that it could stay respondent's immediate release only if there was a risk that he might flee before he could be retried. The court found that petitioners had failed to show a risk of flight (Pet. App. 7a, 8a-9a). The court specifically rejected petitioners' argument that the court should consider respondent's danger to the community in determining whether he should be released (*id.* at 13a).

Petitioners filed a notice of appeal and sought a stay of the district court's order that respondent be released immediately. The court of appeals summarily denied petitioners' motion without an opinion (Pet. App. 19a-20a).

SUMMARY OF ARGUMENT

The language of Rule 23(c), Fed. R. App. P., is very broad. It provides that a prisoner shall be released pending the state's appeal from an order releasing him "unless the court * * * shall otherwise order." That language would appear to invoke the

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[1] That court found that "the testimony which was unquestionably properly adduced by the State was such as to lead overwhelmingly and inexorably to the conclusion of defendant's guilt" (*State* v. *Braunskill*, slip op. 2).

full equitable discretion of the court in determining whether the prisoner should be released. The court of appeals, however, held that Rule 23(c) permits the court to consider only the prisoner's risk of flight. According to the court of appeals, the prisoner's danger to the community and the likelihood that the state will prevail on appeal are not factors that a court may take into account in determining whether the prisoner should be released during the pendency of the state's appeal.

The court of appeals' conclusion is inconsistent with habeas corpus practice, the history of Rule 23, and the standards that apply generally to requests for stays of district court orders pending appeal. As the scope of federal habeas corpus expanded early in this century, the courts developed a practice of granting "conditional writs" of habeas corpus—orders directing the state to release the prisoner unless, within a specified period, the state granted relief such as a new trial. That practice developed in order to avoid the outright release of prisoners who might well remain convicted or be reconvicted after further proceedings in the state court. In effect, through the "conditional writ" practice, the federal courts were granting stays of their orders of release pending further proceedings that could lead to the prisoner's continued incarceration under a lawful state judgment. At the same time, the rule that became Rule 23(c), Fed. R. App. P., was modified to authorize the courts to refuse to release successful habeas petitioners pending the state's appeal from the order granting relief. As in the case of the "conditional writ" practice, the change in the predecessor to Rule 23(c) appears to have been intended to grant the courts broad equitable discretion in making the release decision.

In formulating standards to govern the propriety of release under Rule 23(c), the Court should look to the test that has traditionally been applied to requests for stays of district court judgments pending appeal. Under that test, a court must consider the moving party's likelihood of success on the merits, the potential injury to the appellant and other parties, and the public interest. Those standards are appropriate to the Rule 23(c) determination, because they are consistent with the broad equitable authority traditionally granted to courts in disposing of habeas corpus cases (see 28 U.S.C. 2243), and because the issuance of a stay pending appeal is closely analogous to the denial of a habeas petitioner's request for bail during the pendency of the state's appeal. Applying those standards in the bail setting, it is clear that both the state's likelihood of ultimate success, either on appeal or on retrial, as well as the prisoner's danger to the public, are legitimate concerns that a court can weigh in determining whether the prisoner should be released.

Although this case involves a state prisoner, Rule 23(c) also applies to federal prisoners who are successful in collateral attacks on their convictions. In that setting, the case for considering the prisoner's danger to the community is even more compelling. Although the federal bail statute does not apply directly to proceedings under 28 U.S.C. 2255, the policies of that statute counsel in favor of applying similar principles in the Section 2255 setting. Because Congress has authorized the pretrial detention of persons who are determined to be dangerous, it follows a fortiori that a prisoner's dangerousness should be a permissible factor for a court to consider where a prisoner is seeking release pending the government's

appeal from an order vacating his conviction. The prisoner is in a less favorable position than an indicted defendant, since the prisoner may be reincarcerated if the reviewing court reverses his release order or if he is reconvicted on retrial. For that reason, it would be perverse to construe Rule 23 in a manner that would prohibit a court from detaining a prisoner pending the government's appeal, even though the same prisoner could have been detained pending trial after his initial indictment.

ARGUMENT

A FEDERAL COURT, WHEN DECIDING WHETHER TO ORDER THE IMMEDIATE RELEASE OF A PRISONER WHO HAS BEEN GRANTED HABEAS CORPUS RELIEF, MAY CONSIDER THE PRISONER'S DANGEROUSNESS AND HIS LIKELIHOOD OF ULTIMATE SUCCESS

1. Rule 23(c), Fed. R. App. P., provides that when the prosecution takes an appeal from a district court order granting habeas corpus, the prisoner shall be released "unless the court * * * shall otherwise order." In *Carter* v. *Rafferty*, 781 F.2d 993 (3d Cir. 1986), the court of appeals held that in deciding whether to release a prisoner pending the prosecution's appeal, the court may take into account the prisoner's risk of flight, but not the prisoner's danger to the community. The court reasoned that Rule 23(c) creates a presumption that a prisoner who has been awarded habeas relief is entitled to an immediate release from custody. The only federal interest served by the Rule, the court concluded, is to ensure that the federal courts can return a prisoner to state custody if the state prevails on appeal. 781 F.2d at 995-997. Factors unrelated to the risk that a prisoner will

abscond, such as his danger to the community while at large, "have no relevance" to the Rule, the court held. Those matters, the court concluded, are for the state courts to consider (*id.* at 997).

The *Carter* court was correct that Rule 23(c) establishes a presumption that a successful habeas petitioner is entitled to release from custody. The terms of the Rule as well as its background support that conclusion. *Walberg* v. *Israel*, 776 F.2d 134, 136 (7th Cir.), cert. denied, No. 85-331 (Dec. 2, 1985); *United States ex rel. Thomas* v. *New Jersey*, 472 F.2d 735, 743 (3d Cir.), cert. denied, 414 U.S. 878 (1973); *United States ex rel. Barnwell* v. *Rundle*, 461 F.2d 768, 770 (3d Cir. 1972). Moreover, the *Carter* court correctly recognized that a prisoner can be detained pending the state's appeal if there is a risk that he will flee if he is released. See *LaFrance* v. *Bohlinger*, 487 F.2d 506, 508 (1st Cir. 1973), cert. denied, 419 U.S. 1080 (1974); *United States ex rel. Rice* v. *Vincent*, 486 F.2d 215, 216 (2d Cir. 1973); *United States ex rel. Thomas* v. *New Jersey*, 472 F.2d at 744; *United States ex rel. Taylor* v. *Redman*, 500 F. Supp. 453, 460 (D. Del. 1980). The state has a compelling interest in ensuring that a defendant will be available for trial (see *Bell* v. *Wolfish*, 441 U.S. 520, 534 (1979); *Stack* v. *Boyle*, 342 U.S. 1, 4 (1951)), and the risk that a defendant will abscond has historically been a valid consideration for the court that must set bail (*e.g.*, 18 U.S.C. 3146, 3148 (repealed by the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3141-3156)). That factor is no less relevant and no less important when a convicted defendant has been awarded a new trial.

The *Carter* court erred, however, in concluding that the only relevant consideration under Rule 23(c)

is the risk that a released prisoner will flee. Although the text of Rule 23 is silent with regard to the factors that bear on whether the prisoner should be released pending the prosecution's appeal, the practice followed by the federal courts in habeas cases sheds some light on this question.

By statute, federal courts in habeas cases are authorized "to dispose of the matter as law and justice require" (28 U.S.C. 2243). This Court has construed that statute and its predecessors to authorize federal courts to delay the issuance of a writ of habeas corpus until the state has had an opportunity to correct the constitutional violation that was the subject of the prisoner's motion. See *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206, 210 (1951); *Mahler* v. *Eby*, 264 U.S. 32, 46 (1924); *In re Bonner*, 151 U.S. 242, 261-262 (1394); see also *Cabana* v. *Bullock*, No. 84-1236 (Jan. 22, 1986), slip op. 15; *Rogers* v. *Richmond*, 365 U.S. 534, 549 (1961); *In re Medley*, 134 U.S. 160, 173-174, 175 (1890); *Carter*, 781 F.2d at 994. As the Court explained in *In re Bonner*, the habeas corpus statutes "invested [the courts] with the largest power to control and direct the form of judgment to be entered in cases brought up * * * on *habeas corpus*." 151 U.S. at 261.

Relying on this Court's decisions, the lower federal courts developed the practice in habeas cases of issuing "conditional writs" of habeas corpus: *i.e.*, orders directing the state to afford a prisoner appropriate relief—such as a retrial or an evidentiary hearing—or to release him. A conditional writ of habeas corpus permitted the state to retain custody of a prisoner pending its decision to reprosecute him. In effect, through the use of the "conditional writ," the courts developed the practice of granting stays

of their release orders where equity and the public interest justified such action. See *Lewis* v. *Henderson*, 356 F.2d 105, 106 (6th Cir. 1966); *United States ex rel. Calhoun* v. *Pate*, 341 F.2d 885, 887 (7th Cir.), cert. denied, 382 U.S. 945 (1965); *O'Brien* v. *Lindsey*, 202 F.2d 418, 420-421 (1st Cir. 1953); *Painten* v. *Massachusetts*, 254 F. Supp. 246, 248-249 (D. Mass.), aff'd, 368 F.2d 142 (1st Cir. 1966), cert. granted, 386 U.S. 931 (1967), cert. dismissed, 389 U.S. 560 (1968); see generally *United States ex rel. Thomas* v. *New Jersey*, 472 F.2d at 743 & n.7.

Similar considerations underlie the provision in Rule 23(c) that in effect authorizes the court to stay a district court's order discharging a prisoner for the period of time necessary for the state to appeal the district court's decision on the merits. The state's interest in the enforcement of its criminal laws and the judgments of its courts has no less force when a case is on appeal to a federal court of appeals than when the state is preparing to retry a prisoner. In both cases, the federal courts are called upon to preserve the status quo while the state seeks to reinstate the state court's judgment, either by way of retrial in the state court or by way of appeal in the federal system.

The background of Rule 23 provides further support for the view that the Rule is intended to grant federal broad equitable power to maintain the status quo pending appeal in appropriate cases. Rule 23 had its origins in a Rule of this Court adopted in 1886 to implement the Habeas Corpus Act of 1867, Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. The Rule, Sup. Ct. R. 34.3, 117 U.S. 708 (1886), originally required that the prisoner be released from custody on his own recognizance pending an appeal from an or-

der discharging him. The mandatory nature of the rule remained unchanged during the following 80 years, even though the scope of habeas corpus review of state criminal proceedings expanded dramatically. See *Fay* v. *Noia*, 372 U.S. 391 (1963); *Brown* v. *Allen*, 344 U.S. 443 (1953); see generally *Wainwright* v. *Sykes*, 433 U.S. 72, 77-80 (1977).

In 1967, the Court revised the Rule governing the release of habeas petitioners and eliminated the mandatory requirement of the original Rule. The new Rule, Sup. Ct. R. 49.3, provided that the prisoner "shall be enlarged upon his recognizance, with or without surety, unless the court * * * rendering the decision, or the court of appeals or this court * * * shall otherwise order" (388 U.S. 980 (1967)). Shortly thereafter, the Court promulgated the Federal Rules of Appellate Procedure. Rule 23(c) of the Appellate Rules mirrored this Court's Rule 49.3.

In freeing courts from the restraints of the prior mandatory release requirement, neither the Court nor Congress gave any indication that the lower courts were to be confined in the exercise of their discretion under Rule 23(c) to a single factor, such as the prisoner's risk of flight. To the contrary, contemporary observers emphasized the broad discretion that the new rule was apparently designed to grant to the federal courts. See Boskey & Gressman, *The 1967 Changes in the Supreme Court's Rules*, 42 F.R.D. 139, 161 (1967):

> The amendment gives a measure of discretion to continue detention of the prisoner pending appeal when this seems desirable despite the ruling in his favor. Such discretion might be exercised in cases were officials responsible for the prisoner's detention have been allowed a

> period within which to re-try him or otherwise to cure procedural defects rendering the confinement illegal; moreover, in other situations, the physical or mental condition of the prisoner may make his detention pending appeal appear advisable even though he has prevailed on the merits in the district court.

While the background of habeas corpus practice and the development of Rule 23 suggest that the courts were intended to exercise broad discretion in determining whether and under what conditions to release successful habeas petitioners, they do not provide direction as to the standards that should be used in exercising that discretion. In seeking appropriate standards, we submit, the courts should look to the standards that apply in the closely analogous setting of requests for stays of district orders pending appeal.

Rule 8, Fed. R. App. P., is the rule that governs the granting of stays pending appeal. Under that rule, courts of appeals may stay the release of a prisoner pending appeal, just as they may stay any other type of order entered by a district court. See *Walberg* v. *Israel*, 776 F.2d at 135-136; *United States ex rel. Rice* v. *Vincent*, 486 F.2d at 216-217; cf. *Tate* v. *Rose*, 466 U.S. 1301, 1302 (O'Connor, Circuit Justice), motion to vacate stay denied, 467 U.S. 1249 (1984). Because the denial of bail to a successful habeas petitioner has the same effect as the issuance of a stay pending the state's appeal from an order granting habeas relief, it follows that the standard for granting bail under Fed. R. App. P. 23(c) should be the same as the standard for granting a stay under Fed. R. App. P. 8.

The standard that has traditionally governed the issuance of a stay pending appeal requires the court to balance four related factors: (1) whether the moving party has made a strong showing that he is likely to prevail on the merits;[2] (2) whether the moving party will be irreparably injured absent a stay; (3) whether the issuance of a stay will injure the prevailing party below; and (4) whether injunctive relief furthers the public interest. *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); see also, *e.g.*, *Garcia-Mir* v. *Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986); *United States* v. *Baylor University Medical Center*, 711 F.2d 38, 39 (5th Cir. 1983); *James River Flood Control Ass'n* v. *Watt*, 680 F.2d 543, 544 (8th Cir. 1982). To be sure, a habeas corpus proceeding involves considerations that are not present in other types of civil suits. Those differences, however, can be taken into account in applying the standard for a stay pending appeal and do not require that an altogether different standard be employed.

In this context, the first and third factors are complementary. When the state can show that it has a strong case on appeal or that it is likely to reconvict the prisoner at a retrial, both factors are met. The

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[2] This element of the Rule 8 standard does not require a moving party in every case to prove that it is more likely than not to prevail on appeal; rather, a moving party may obtain a stay pending appeal if it can establish a substantial case on the merits and show that the remaining factors strongly militate in favor of interim relief. *Ruiz* v. *Estelle*, 650 F.2d 555, 565-566 (5th Cir. 1981); *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843-845 (D.C. Cir. 1977); see *Providence Journal Co.* v. *FBI*, 595 F.2d 889, 890 (1st Cir. 1979).

second and fourth factors can be satisfied if the state can show that there is a risk that the prisoner will flee or that he will be a danger to the community if he is released. A prisoner's interest in being released from custody should be weighed heavily in the balance, but it is not dispositive. When the other factors cut strongly in favor of the state, the prisoner should remain in custody.

The *Carter* court therefore went wrong in concluding that a prisoner's danger to the community has no role to play in the determination whether to release him under Rule 23(c). A prisoner's dangerousness is a legitimate consideration when the question is whether he should be granted bail pending the direct appeal of his conviction. See 18 U.S.C. (Supp. II) 3143; *Rehman* v. *California*, 85 S. Ct. 8, 9 (1964) (Douglas, Circuit Justice); *Carbo* v. *United States*, 82 S. Ct. 662, 666, 669 (Douglas, Circuit Justice), aff'd, 369 U.S. 868 (1962); *United States* v. *Miller*, 753 F.2d 19, 24 (3d Cir. 1985). The situation here is not materially different. A judgment of conviction entered in a state court is entitled to deference. The district court's ruling that the prisoner should be awarded habeas relief casts doubt upon the validity of the state court's judgment, but the prisoner is still under a judgment of conviction until the district court's judgment is affirmed on appeal and becomes final. In the meantime, if the state can demonstrate that the prisoner will be a danger to the community if he is released, nothing in Rule 23(c) forbids a federal court from considering that evidence in order to determine whether detaining the prisoner best serves the public interest.

2. Although this case involves a state prisoner, it is important to note that Rule 23(c) applies to fed-

eral prisoners as well.[3] At least in the case of federal post-conviction proceedings brought under 28 U.S.C. 2255, the Bail Reform Act of 1984, 18 U.S.C. (Supp.

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[3] By its terms, Fed. R. App. P. 23 applies only to "habeas corpus proceeding[s]" and therefore would not appear to apply to post-conviction proceedings brought by federal prisoners under 28 U.S.C. 2255. See Rule 1 advisory committee note of the Rules Governing Section 2255 Proceedings for the United States District Courts, 28 U.S.C. 2255 note at 365 (explaining differences between habeas corpus actions and motions for post-conviction relief filed under 28 U.S.C. 2255). Two federal courts of appeals, however, have stated that Fed. R. App. P. 23 applies to Section 2255 proceedings. *Ostrer* v. *United States*, 584 F.2d 594, 597 (2d Cir. 1978); *United States* v. *Dansker*, 561 F.2d 485, 486-487 (3d Cir. 1977) (en banc). That conclusion is correct, for two reasons.

First, when the original version of the current Fed. R. App. P. 23 was adopted as a Rule of this Court in 1886, a federal prisoner could bring a post-conviction challenge to his conviction under the general habeas corpus statute. Rev. Stat. § 753 (1873-1874 ed.). In 1948, Congress enacted 28 U.S.C. 2255 as a substitute for habeas corpus for federal prisoners. See *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977); *Hill* v. *United States*, 368 U.S. 424, 427 (1962). Neither Congress nor this Court, however, modified the then-current version of this Court's rule governing the release procedures for prisoners (Sup. Ct. R. 45, 306 U.S. 724 (1939)), and that Rule later became Fed. R. App. P. 23(c). Accordingly, in spite of the imprecision in language, it appears that Fed. R. App. P. 23(c) is intended to apply to federal post-conviction proceedings under 28 U.S.C. 2255, as well as true habeas corpus proceedings.

Second, Fed. R. App. P. 23 would apply to federal post-conviction proceedings in any event by virtue of Rule 12 of the Rules Governing Section 2255 Proceedings for the United States District Courts, 28 U.S.C. 2255 note at 372. Rule 12 provides that "[i]f no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable

II) 3141-3156, provides an additional reason why the foregoing principles should be applied under Fed. R. App. P. 23(c). Although the Bail Reform Act does not in terms apply to Section 2255 proceedings, the policies underlying the Act strongly militate in favor of its application in that setting. See *United States* v. *Schiavo*, 587 F.2d 532, 533 (1st Cir. 1978) (applying Bail Reform Act of 1966 (repealed by Bail Reform Act of 1984) when a federal prisoner was granted relief under 28 U.S.C. 2255); cf. *Rose* v. *Lundy*, 455 U.S. 509, 515 (1982).[4]

The Bail Reform Act of 1984 establishes a comprehensive procedure authorizing the detention of a person in federal custody who has been charged with

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statute." No federal statute specifically adopts a standard for releasing a federal prisoner pending the government's appeal of a district court's order granting a Section 2255 motion. Therefore, even if Rule 23(c) were not directly applicable, the district courts would look to that rule as an analogous provision giving instructive guidance.

[4] The Bail Reform Act of 1984 does not apply when a federal prisoner has been denied relief under 28 U.S.C. 2255. *Cherek* v. *United States*, 767 F.2d 335, 337 (7th Cir. 1985); see *United States* v. *Kelly*, 790 F.2d 130, 139 (D.C. Cir. 1986) (Bail Reform Act of 1984 does not apply when a federal prisoner has been denied a motion for a new trial under Fed. R. Crim. P. 33); *United States* v. *Dansker*, 561 F.2d at 486-487 (same rule for Bail Reform Act of 1966). And, of course, the Bail Reform Act of 1984 does not apply to state prisoners at all, whether they have been awarded or denied habeas corpus relief. *Carter* v. *Rafferty*, 781 F.2d at 995 & n.3; *Cherek* v. *United States*, 767 F.2d at 337; see *United States ex rel. Thomas* v. *New Jersey*, 472 F.2d at 741; *Woodcock* v. *Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972); *Ballou* v. *Massachusetts*, 382 F.2d 292, 293 (1st Cir. 1967); *Hill* v. *Rose*, 579 F. Supp. 1080, 1091 (M.D. Tenn. 1983); *DeAngelis* v. *South Carolina*, 330 F. Supp. 889, 891 (D.S.C. 1971).

a crime, who is awaiting sentencing, or who has taken an appeal from a judgment of conviction. 18 U.S.C. (Supp. II) 3141-3143. The Act was the culmination of Congress's 18-year effort to establish coherent and fair standards for pretrial and post-trial release; it strikes a balance between an individual's interest in being free from confinement and the public interest in safety; and it establishes a number of safeguards to protect the liberty interests of accused and convicted persons. See generally S. Rep. 98-225, 98th Cong., 1st Sess. 3-36 (1983). The Bail Reform Act of 1984 plainly "covers the whole subject" (*Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 468 (1982)) of the detention or release of federal defendants and prisoners pending trial, sentencing, and appeal, and it provides a relevant benchmark for the federal courts when deciding whether to release a federal prisoner who has been awarded relief under 28 U.S.C. 2255.

A contrary conclusion would be inconsistent with the provisions of the Bail Reform Act of 1984 providing for pretrial detention (18 U.S.C. (Supp. II) 3141) or for detention pending the government's pretrial appeal (18 U.S.C. (Supp. II) 3143(c)). For example, if a federal prisoner obtains relief on a collateral challenge to his conviction and the government elects to retry him rather than to appeal, the government is entitled to prove that the prisoner should be detained pending retrial. Similarly, if a defendant persuades a district court to suppress evidence before trial, the government may seek to have the defendant confined during the government's appeal. In both cases, the government is entitled to prove that the defendant should be detained because he is a danger to the community. There is no reason why the government

should be in a *worse* position pending the appeal of a district court's decision to release a federal prisoner under 28 U.S.C. 2255. The Bail Reform Act of 1984 therefore strongly militates in favor of permitting a federal prisoner in respondent's position to be detained pending the government's appeal because of his danger to the community.[5]

3. The only remaining question is whether petitioners have carried their burden under Fed. R. App. P. 23(c) and are entitled to a stay of respondent's release pending a decision by the court of appeals on the merits of their appeal. The court of appeals' summary affirmance order (Pet. App. 19a-20a) does not indicate whether that court concluded that petitioners' motion for a stay was foreclosed by that court's earlier decision in *Carter* v. *Rafferty*, *supra*, or was factually insufficient even under the standard that petitioners urged in the district court. In these circumstances, we submit that the appropriate course is to leave to the court of appeals on remand the task of applying the correct standard to petitioners' claims in the first instance.

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[5] We note that the federalism concerns underlying the decision in the *Carter* case (781 F.2d at 996-997) have no relevance when a federal prisoner obtains collateral relief under 28 U.S.C. 2255. When Rule 23 is invoked in that setting, there is no risk that the federal courts will intrude on "traditionally state concerns" (*Carter*, 781 F.2d at 997) or disrupt "matters of state policy" (*id.* at 997 n.5). The federal courts will simply apply the same "federal common law of detention" (*ibid.*) in that setting that they would apply if pretrial detention were involved.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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